SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 486

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF MICHIGAN CONSOLIDATED GAS COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Michigan Consolidated Gas Company.

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I

The Determination of the Michigan Supreme Court in This Case Is Not a "Final Judgment or Decree" Upon Which an Appeal Can be Based.

The Statement as to Jurisdiction, filed by the appellant, "Panhandle", relies on the *same misconstruction* of the order of the Michigan Public Service Commission which

Panhandle urged unsuccessfully in the Supreme Court of Michigan—which court affirmed the order and gave it an *authoritative* construction.

The Supreme Court of Michigan states:

> "Panhandle construes the order of the Michigan Public Service Commission as an absolute denial of the right of Panhandle to sell natural gas in this State direct to local consumers for their own consumption and use; in other words, that said order denies Panhandle a certificate of public convenience and necessity to sell natural gas direct to local consumers. *We do not so construe the order.*" . . . "It leaves the door open for a hearing before the Michigan Public Service Commission as to whether or not public convenience and necessity requires the granting of such a certificate to Panhandle, *after a proper hearing on that question.*"

Accordingly the only "right" of Panhandle which it now asks the Supreme Court to sustain is its "right" to refuse to obey the express requirement of the Michigan statute (Act 69, Section 2 of the Public Act of 1929 of Michigan) which provides that no public utility shall begin or carry on any "local business", such as Panhandle wishes to engage in, "until such public utility shall first obtain from the Commission a certificate that public convenience and necessity requires or will require such construction, operation, service or extension."

If Panhandle had applied for such a certificate then the Commission would have been obligated to consider all legal issues and to take evidence as to all facts bearing upon the proper exercise of its statutory powers, and to make a decision which might be either—

(1) To grant an unqualified certificate, or

(2) To grant a certificate on conditions (such as submitting to regulation of rates or service) or

(3) To deny a certificate, on the basis of findings of fact and conclusions of law laid down by the Commission.

Panhandle would have had no complaint against the first alternative decision; nor, probably against the second alternative in the light of the overruling of its original claim to immunity from State regulation, by the Supreme Court of the United States in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507. But, after either decision any aggrieved person would have had the right to a judicial review of the Commission action, upon an adequate record of the facts relied upon to support the order of the Commission.

Similarly if, in the third alternative, the certificate had been denied, then, an adequate record would have been available for judicial review.

It is, however, the effort of Panhandle by the present premature appeal to induce this Court to hold that under no circumstances and upon no showing of public interest could the Michigan Commission lawfully deny an unconditional certificate to Panhandle . . . and that therefore Panhandle is not obligated to apply for a certificate.

Counsel for Panhandle must concede, after their defeat in the Indiana case, *supra*, that the Michigan Commission has complete and exclusive authority to regulate the rates and services of their direct sales. Whether this "local business" is still, in legal contemplation, a part of interstate commerce (but subject to state regulation), or a part of intrastate commerce, may not be decisive as to whether a certificate should be granted or denied. But, how can *this issue of fact* be determined and legal conclusions be made except upon application for a certificate and a hearing thereon?

It is certainly not the denial of a constitutional right to require anyone asserting it to apply for a hearing upon his assertion of his right. An interstate utility cannot, under cover of "interstate commerce", assert a "constitutional right" to refuse to submit to any determination of whether it is not in fact engaging in intrastate commerce.

This present "constitutional" claim of the appellant, Panhandle, is peculiarly lacking in substantial merit, because it has been already held invalid by this Court, against all the contentions which Panhandle would now advance, in the former appeal of Panhandle itself, in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*, where this Court held:

> "Broadly the question is whether Indiana has power to regulate sales of natural gas by an interstate pipe line carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const. Art. 1, Sec. 8, by its own force forbids the appellee, public service commission, to require appellant to file tariffs, rules and regulations, annual reports, etc., *as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.*" [1] (pp. 508-9.) (Italics ours.)

The footnote (1) to the above quotation adds: "The Commission is authorized to take these steps by Indiana statutes creating the State's regulatory scheme for public utilities. Burns Ind. Stat. Am. Sec. 5-4-101 *et seq.*"

The Michigan statute not only "authorizes" an application to the Commission as a *preliminary step*, but *requires* the utility in this manner to bring its project to the attention of the Commission, and requires the Commission to give it due consideration. (Sections 2, 5 and 6 of Act 69, above cited, and quoted in Appellant's Statement and Opinion of Michigan Public Service Commission.)

Thus, by statute, it is made a matter of administrative routine for a utility to file, and for the Commission to consider, an application for a certificate, as a preliminary step in the exercise of what this Court has expressly held to be a valid power of state regulation. Why is Panhandle challenging the validity of this incidental requirement of a valid law, which is necessary for its orderly administration? The obvious motive for this appeal is the desire for an advance opinion from the Supreme Court which might aid Panhandle to obstruct effective regulation of its direct sales by the Michigan Commission. The appeal is a safe gamble, because even if this Court rules against Panhandle now, all of the utility's objections to any specific regulation can be presented again to this Court in a future appeal from any ultimate, adverse decision of the Commission—on the ground that it violates in some manner a constitutional right to "due process of law."

This Court in the present appeal cannot decide that Panhandle is or is not entitled to a certificate. It is only being asked to make the unprecedented ruling that a state law cannot require a utility company, which is subject to state regulation, to apply for a certificate, in order to inaugurate the statutory procedure of regulation.

The cases cited by counsel for appellant have no application to the present issue. The rulings in such cases as *Buck* v. *Kuykendall*, 267 U. S. 307, and *Hood & Sons* v. *DuMond*, 336 U. S. 525, are to the effect that the state cannot absolutely prohibit a company engaged in interstate commerce from competing with either interstate or intrastate companies. Whether this rule would prevent a state from enforcing a policy against duplication of a service which, in the public interest, should be a regulated monopoly, need not be debated here, because, even if the Michigan Commission exercised its statutory authority to deny a certificate to

Panhandle to serve the one customer whom it is presently offering to serve, it is clear that the Commission would not, and could not, prohibit Panhandle from serving many other customers. The Michigan statute only requires (Sec. 2, Act 69, *supra*) the obtaining of a certificate as a prerequisite to serving customers "in any municipality in this state wherein any other utility or agency is then engaged in such local business and rendering the same sort of service."

Thus, it is plain that, if there is to be any regulation of competition in the grant, or limitation, or denial of a certificate, the statute does not contemplate nor authorize the prohibition of competition by an interstate company *as such*. It only authorizes the application of rules of competition applying alike to intrastate and interstate companies. This is clearly within the necessary scope of state regulatory power. That regulatory power has been sustained by this Court in unequivocal language. Whether direct sales be regarded as sales in interstate commerce or in intrastate commerce is immaterial. This Court has held directly on this point:

> "The controlling issues therefore are two: (1) Has Congress, by enacting the Natural Gas Act, 52 Stat. 821, 15 U. S. C. Sec. 717, in effect forbidden the States to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the States to act.
>
> "We think there can be no doubt of the answer to be given to each of these questions, namely, that *the States are competent to regulate the sales.*" * * * (pp. 513-14)
>
> "The act, though extending federal regulation, had no purpose or effect to cut down State power. On the contrary, perhaps *its primary purpose was to aid in making State regulation effective*, by adding the weight

> of Federal regulation to supplement and reinforce it in the gap created by prior decisions." (Italics ours) *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Commission of Indiana, supra.* (p. 517)

There is not a word in the above opinion qualifying or limiting the State power of regulating sales by an interstate company as any less than its power of regulating sales by an intrastate company. Panhandle is bringing billions of cubic feet of gas into Michigan and is selling it for resale, free from any Michigan regulation; and this Court has made it plain in the above opinion that there will be no "destruction" or prohibition of interstate commerce if the State through its Commission, in regulating direct sales of some of Panhandle's gas, exercises "the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests" (P. 523).

How can this Court determine whether the Michigan Commission will impose "terms reasonably related to the necessity of protecting local interests" before the Commission has had any opportunity to impose any terms at all?

The lack of finality in the present decision of the Supreme Court of Michigan is even more evident than in the case of *Republic Natural Gas Company* v. *Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, where this Court dismissed the appeal for lack of "finality" in the state court's decision. In that case the state Commission in effect forbade Republic to take natural gas from its own wells without accepting ratable amounts of gas from wells of another owner in the same field. The Commission's order further provided that if the parties could not agree on the terms at which Republic would market the gas of the second owner, the Commission

would itself determine those questions. In that case this Court said:

> "This prerequisite for the exercise of the appellate powers of this court is especially pertinent when a constitutional barrier is asserted against a state court's decision on matters peculiarly of local concern. * * * Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up. * * * One thing is clear. The considerations that determine finality are not abstractions, but have reference to very real interests, not merely those of the immediate parties but more particularly those that pertain to the smooth functioning of our judicial system. * * * Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction."

In the Republic Gas Company case, as in this case, if further proceedings before the Commission resulted in an order satisfactory to the appellant, no appeal at all would result. On this point the opinion of the Court, by Mr. Justice Frankfurter, held:

> "A profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. It is, of course, not our province to discourage appeals, but for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop."

The opinion of the court also pointed out that until final action by the Commission, it could not be determined what questions, if any, might be raised on appeal:

> "It is that the matters left open may generate additional federal questions. This brings into vivid relevance the policy against fragmentary review * * *

> This potentiality of additional federal questions arising out of the same controversy has led this court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here."

Mr. Justice Douglas, in his concurring opinion in the Republic Gas Company case, likewise pointed out:

> "For the single constitutional question necessary for decision will not be isolated until the precise pinch of the order on the appellant is known. It will not be known in the present case at least, until the appellant elects or is required (1) to shut down, (2) to become a carrier of the Peerless Gas, or (3) to purchase it. * * * The fact that each would raise only questions of due process under the Fourteenth Amendment does not mean that the questions are identical. Even when reasonableness is the test, judges have developed great contrariety of opinions. The point is that today the variables are presented only in the abstract, tomorrow the facts will be known when the precise impact of the order on appellant will be determined. Thus to me the policy against premature constitutional adjudication precludes us from saying the judgment in the present case is 'final.'"

If this court entertains the present appeal, regardless of its outcome further proceedings before the Commission will be necessary for the exercise of the Commission's conceded jurisdiction to regulate service and fix rates for the sales in question. Such further proceedings would probably result in another appeal on constitutional issues. Thus, the present appeal must be regarded as that "fragmentary review" which the requirement of finality is intended to avoid. The following language of this court in dismissing the appeal in *Laclede Gaslight Co.* v. *Public Service Com-*

mission of Missouri, 304 U. S. 398, 82 L. Ed. 1422, is clearly applicable to this case:

> ". . . . the direction of the court for remand to the Commission for further examination of the questions stated apparently leaves in abeyance the final determination of the validity of the rate order and may result, as the Commission states, in action which may constitute the basis of another appeal."

II

No Substantial Federal Question Is Involved in This Appeal

This appeal also presents no substantial federal question for the reason that the only substantial question which appellant is seeking to have considered is one which this court has already definitely decided adversely to appellant's claim.

In effect that question is: Does a state's undoubted power to regulate direct sales include the power to prohibit them in a situation where prohibition is the form of regulation required in the public interest? That a state's regulatory power includes the power to prohibit in a proper case was clearly announced by this Court in *Robertson* v. *California,* 328 U. S. 440, 90 L. Ed. 1366. In that case this Court upheld the application to interstate insurance companies of a California law forbidding insurance business in the state to companies operating on the assessment plan. This Court held:

> "*Not the mere fact or form of licensing, but what the license stands for by way of regulation is important. So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative.* For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress regardless of the effects of the importation upon the local community. * * * *Exclusion*

there is, but it is exclusion of what the state has the power to keep out until Congress speaks otherwise." (Italics ours)

That a state has the power to regulate direct sales of natural gas by an interstate pipe line was established beyond question by this Court in its decision in *Panhandle Eastern Pipe Line Company* v. *Indiana Public Service Commission*, 332 U. S. 507, 92 L. Ed. 128. The Michigan Supreme Court interpreted that case as establishing the rule that such regulatory power of the state must include the power to prohibit such direct sales where prohibition is the form of regulation required in the public interest. In so doing we submit that the Michigan court gave the only reasonable interpretation possible to the language of this Court's opinion. To claim otherwise is to endeavor to circumvent the decision. That is clear from the following quotations from the opinion:

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the Federal and State regulatory agencies. *It does not contemplate ineffective regulation at either level.* We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme * * *. The scheme was one of cooperative action between Federal and State agencies. It could accomplish neither that protective aim nor the *comprehensive and effective dual regulation Congress had in mind*, if those companies could divert at will all or the cream of their business to unregulated industrial uses." (Italics ours) (pp. 520-1)

The Court finally made the forceful comment, applicable to the present contentions of appellant:

> "The attractive gap which appellant (Panhandle) has envisioned in the coordinate schemes of regulation is a mirage." (p. 524)

The comprehensive nature of the state's control over direct sales by interstate pipe lines is further indicated by the court's discussion in the Indiana case of the purposes which the state's power must accomplish. It is axiomatic that a power must be sufficient to accomplish the purposes for which the power exists. The court said that without the powers which it ascribed to the states, "the state regulatory system would be crippled and the efforts of the Indiana Commission seriously handicapped in protecting the interests of other classes of users equally, if not more, important." This must mean that the state's control over these direct sales is sufficient to prevent the crippling of the state's regulatory system; and it is likewise sufficient to protect the interest of other classes of users than those served by direct sales from the interstate lines. What interests and which users the court felt were to be protected through the state control is clearly shown by the court's official footnote to the last quotation above, which reads as follows:

> "Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies."

To give this statement any meaning it must be evident that the Court assumed that regulation of competition was an essential part of the state regulatory power which it sustained.

On page 16 of appellant's statement as to jurisdiction it says, regarding the Michigan statute: "Further, the plain purpose of the statute is to limit competition." This confuses the purpose of the statute with the means of accomplishing that purpose. The *purpose* of the statute is not to protect a local utility from competition. Rather, it is to protect the general public interest. If the public interest requires limitation, or even elimination, of competition, such limitation or elimination is merely the appropriate means to accomplish the real purpose of the Act. The power exists, as this court said in *Panhandle* v. *Indiana Commission*, supra, to prevent a situation in which "the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally, if not more important." (p. 522)

We will now briefly consider the cases relied on by the appellant to support its claim that a state cannot in the public interest prohibit an interstate carrier of gas from selling in a particular locality or to a particular consumer in competition with a regulated legal monopoly already serving that locality or that consumer. None of these cases is authority for such a holding. Appellant's cases (Statement as to Jurisdiction, page 12) are:

West v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911);
Barrett v. *New York*, 232 U.S. 14 (1914);
Sault Ste. Marie v. *International Transit Co.*, 234 U.S. 333 (1914);
Buck v. *Kuykendall*, 267 U.S. 307 (1925);
Bush and Sons Co. v. *Maloy*, 267 U.S. 317 (1925);
Hood & Sons v. *DuMond*, 336 U.S. 525 (1949);
Mayor of Vidalia v. *McNeeley*, 274 U.S. 676 (1926);
Allen v. *Galveston Truck Line Corp.*, 289 U.S. 708 (1932).

In each of these cases commerce was forbidden. In the West case the State of Oklahoma sought to forbid the export of natural gas from the state. In the Allen, Buck and Bush cases the states of Texas, Washington and Maryland forbade an interstate carrier from engaging in interstate transportation in competition with existing interstate carriers solely for the purpose of regulating competition in interstate commerce. In the Vidalia, Sault Ste. Marie and Barrett cases legislation forbade the interstate or foreign commerce until the carrier paid a fee to and secured a license from the municipality. None of these cases related in any way to those features of interstate commerce which the Supreme Court has held were matters of paramount local interest. That direct sales to consumers by an interstate pipe line are a matter of paramount local interest is clear from the decision of the Supreme Court in *Panhandle* v. *Indiana Commission*, supra.

In the remaining case cited by the appellant, *Hood* v. *DuMond*, a majority of the Supreme Court struck down the action of the New York state authorities in denying a purchaser the right to establish an additional milk station for the purchase of milk for shipment in interstate commerce. In this case the court also emphasized the fact that the flow of milk into the Boston market was subject to regulation by the Secretary of Agriculture under the Agricultural Marketing Agreement Act and pointed out the conflict between this state regulation and the Federal regulation.

If we believed that this Court, after accepting jurisdiction of this appeal, might then decide that the Michigan Commission had an absolute power to grant or deny a certificate in its discretion or had no constitutional power to require Panhandle to apply for a certificate and no power to impose any terms on Panhandle's direct sales

"reasonably related to the necessity for protecting the local interests," we would not oppose the acceptance of jurisdiction. Such an advisory opinion might afford some guidance in further proceedings before the Commission. But we cannot reasonably assume that the Court will find it proper to make either decision.

Certainly, the powers of the Commission must be reasonably exercised. Certainly, the administrative procedure essential to a reasonable exercise of those powers must be followed. Certainly, after the exercise of those powers, the opportunity for judicial review will be taken by Panhandle, or any other aggrieved party, and thus all questions as to the reasonableness of the statutory procedure and the reasonableness of the exercise of statutory powers will be presented for a judicial review upon an adequate record.

In these circumstances it seems to counsel for Michigan Consolidated Gas Company that the accompanying motion to affirm or to dismiss should be presented and granted. By such summary action by this Court the construction of the Michigan statute by the Supreme Court of Michigan will be upheld against an appeal which can be characterized as either premature or frivolous. By such action a waste of time by this Court and by all the parties will be avoided; and a final adjudication of all issues between the parties will be advanced. The earliest possible submission of Panhandle to the unquestioned regulatory power of the Michigan Commission is obviously in the public interest.

MOTION TO DISMISS OR AFFIRM

Michigan Consolidated Gas Company, appellee, respectfully moves that this appeal be dismissed or, in the alternative, that the decree of the Michigan Supreme Court appealed from be affirmed.

This motion is made under Section 3, Rule 12 of the Rules of the Supreme Court of the United States and is based on the matters set forth in this appellee's Statement of Grounds Opposing Jurisdiction filed herewith.

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